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ALEXANDER L. STEVAS,
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No. 83-1222

IN THE

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CLEROW WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

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Question Presented for Review.

Does a "seizure" occur within the meaning of the Fourth Amendment to the United States Constitution when police officers randomly approach a citizen, ask for a minute of his or her time, and upon acknowledgment:

1. Informs that person that they are narcotics officers conducting an investigation; and,
2. Informs that person that they have received information that he or she is carrying a large quantity of drugs; and,
3. Asks that person if he or she is in possession of any drugs; and
4. Asks for permission to search that person's luggage, briefcase, purse or pockets.

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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CLEROW WILSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Facts.

On March 10, 1981, at approximately 11:30 A.M., Detective Kaiser, an undercover narcotics officer with the Los Angeles Police Department, and his partner, Deputy Gary Frederick of the Los Angeles County Sheriff's Department, dressed in plainclothes, went to the Pan American Airlines arrival area at the Los Angeles International Airport. (R.T. 116-117). The officers were monitoring flights from Florida on a daily basis in order to arrest persons transporting narcotics into the State from Florida. (R.T. 119-120). On this day, Detective Kaiser observed Mr. Wilson exit Flight 440 from Miami. With Mr. Wilson was another man, later identified as his nephew, Rashon Wilson. (R.T. 117-118). Detective Kaiser recognized Mr. Wilson from television appearances and knew that he was recognized in the community as a celebrity. (R.T. 128).

Detective Kaiser testified that he was not expecting to see Mr. Wilson get off the plane, nor had he prior to that date received any information that Mr. Wilson was involved in any kind of illegal activity. (R.T. 119, 127).

Detective Kaiser observed nothing unusual about Mr. Flip Wilson (R.T. 130), but testified that Mr. Rashon Wilson made eye contact with him twice, which was consistent with the behavior of drug couriers he had arrested in the past. (R.T. 121). Detective Kaiser was relying on his experience, but he could not articulate his feelings of suspicion to differentiate the eye contact of drug couriers from the eye contact of non-drug couriers. (R.T. 132). He finally conceded that Mr. Rashon Wilson may well have been looking for someone who was meeting the plane and that this eye contact in and of itself was not particularly noteworthy. (R.T. 133-135).

Mr. Flip Wilson was carrying an attache case and Mr. Rashon Wilson was carrying a box. Detective Kaiser testified that there was nothing unusual about these items. (R.T. 141). The two Mr. Wilsons were then met by Mrs. Flip Wilson and all three exited the building to the sidewalk. Mr. Flip Wilson thereafter put the attache case and box on the rear seat of his car which was at the curb and Rashon went to the baggage claim area.

Detective Kaiser and Deputy Frederick followed Rashon and as he exited the baggage claim area approached him and displayed police identification. Deputy Frederick spoke with him.

Thereafter, Detective Kaiser approached Mr. Flip Wilson, who was standing at the open trunk of the vehicle[1] for the purpose of gaining his consent to search his luggage.

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[1]Wilson testified that when Kaiser first approached him, he was seated in the driver's seat of the car and Kaiser leaned through an open rear door. (R.T. 187, 190).

(R.T. 149). Detective Kaiser displayed his police identification, informed him that he was a police officer, and asked if he might have a minute of his time. Mr. Wilson said "Sure." (R.T. 124).

Detective Kaiser then informed him that he was "conducting a narcotics investigation and that he had received information that he would be arriving today from Florida carrying a lot of drugs."[2]

Detective Kaiser, then without any prior *Miranda*[3] warnings, asked Mr. Flip Wilson if he had any drugs with him. (R.T. 151). Mr. Wilson denied knowledge of any drugs. (R.T. 125). Detective Kaiser then asked if he could search Mr. Wilson's luggage which had been retrieved and was resting on the sidewalk next to the car. Mr. Wilson assented. (R.T. 124). Detective Kaiser then turned his attention to the attache case on the back seat of the car and again asked for permission to search. Mr. Wilson is alleged to have said, "There should only be some papers in there, but you can go ahead and look if you'd like."[4] (R.T. 125). The con-

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[2]Detective Kaiser testified that this information came from his partner, Deputy Frederick, who received it from some anonymous third person. (R.T. 146-147). The prosecution declined to call Deputy Frederick as a witness and the trial court sustained defense counsel's objection to the use of this information to support the validity of the police conduct. The People have not challenged this ruling. (R.T. 176-177).

[3]*Miranda v. Arizona* (1966) 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484.

[4]Mr. Flip Wilson testified that in response to Detective Kaiser's request to search the attache case he said:

Mr. Wilson: I said, "I would prefer that you didn't."
And he said, "Are you telling me that I cannot search the attache case?"
I said, "I would prefer that you didn't."
He said, "Are you refusing to allow me to search the attache case?"
And I said, "Sir, I am telling you that I would prefer that you didn't."
And he said, "I am not concerned if you're carrying just a small quantity for your personal use. I'm only concerned with a large quantity."
I said, "Since you put it in those terms, okay."
So I turned around in the seat, and I leaned over the back of the driver's seat, and I opened the attache case and I raised the lid.
(R.T. 191-192).

traband was recovered after Mr. Wilson opened the attache case for Detective Kaiser. Detective Kaiser then asked Mr. Wilson "*If he would mind* accompanying me back to my narcotics office situated at the airport. . . ." (R.T. 126). (Emphasis added) At the time of this request, Mr. Wilson was technically under arrest (not free to go) but this was not communicated to him. (R.T. 153).

Procedural History.

1. Mr. Wilson was charged with violation of California Health and Safety Code Sections 11350(a) and 11357(a). In the trial court, a motion to suppress the evidence was made pursuant to Section 1538.5(i) of the California Penal Code. This motion alleged that the seizure of the evidence was made in violation of both the Federal and State Constitution. This motion was denied. (R.T. 251).

2. The defense filed a Petition for Writ of Mandate in the Court of Appeal. This request for hearing was summarily denied on January 22, 1982. A Petition for Hearing to the California Supreme Court was granted on February 18, 1982 and the matter was retransferred to the Court of Appeal of the State of California, Second Appellate District, Division One with directions to hear in light of two California Supreme Court cases — *In re Tony C.* (1978) 21 Cal. 3d 888, 148 Cal. Rptr. 366, and *People v. Bower* (1979) 24 Cal. 3d 638, 156 Cal. Rptr. 856. (Appendix A). Following the hearing in the State Court of Appeal, a divided court denied the issuance of a writ. In dissent, Justice Dalsimer wrote strongly that Mr. Wilson had been seized in violation of his Federal Constitutional rights.[3]

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[3]Justice Dalsimer, in his dissenting opinion, writes:

"Any 'reasonable person' upon being confronted by a man who identified himself orally and by display of credentials as a police officer and who states that he is conducting a narcotics investigation of the accosted person based on information that such person was arriving at the scene carrying a lot of drugs would believe that he was not free to leave. Indeed, if under all of those circumstances a person believed that he was free to leave, not only would he be 'unreasonable' but also he would be out of touch with reality."

(Dissent at page 257B Appendix to Petition).

3. A second Petition for hearing to the California Supreme Court was granted and on October 20, 1983, in a unanimous opinion authored by Justice Kaus, ruled that Mr. Wilson had been seized in violation of his Federal Fourth Amendment rights. Although the Court had earlier cited California Supreme Court cases interpreting the California Constitution in retransferring the matter to the Appellate Court, no opinion was expressed as to independent state grounds for granting the writ of mandate.

4. Petitioner on December 8, 1983, requested a stay of the peremptory writ and remittitur in the California Supreme Court. This request was denied by Chief Justice Bird on December 21, 1983. (Appendix B).

5. Petitioner then sought a stay from the Honorable William H. Rehnquist, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit. This request was denied on January 10, 1984. (Appendix C).

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI.

I.

The Unanimous Judgment of the California Supreme Court Was Correct and Relied Upon Established Principles of Federal Law.

In 1968, this Court established a test for when a "seizure" occurs within the meaning of the Fourth Amendment.

> ". . . when the officer, by means of physical force or show of authority, has *in some way* restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." *Terry v. Ohio* (1968) 392 U.S. at 19, Note 16; 20 L.Ed. 2d 889, 88 S.Ct. 1868. *Emphasis added.*

This test has been reinforced by Justice Stewart's separate opinion in *United States v. Mendenhall*, 446 U.S. 544, 554, 75 L.Ed. 2d at p. 239, 103 S.Ct. at p. 1326, wherein he writes: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The California Supreme Court noted that this has the support of a "substantial majority — and perhaps all — of the Supreme Court Justices." *Wilson v. Superior Court* (1983) 14 Cal. 3d 777 at 790. The Court elaborated:

> "Six members of the present court have either authored or joined in opinions explicitly endorsing the *Mendenhall* standard. Justices White, Marshall, Powell and Stevens signed the lead opinion in *Royer*; Justice Blackmun expressly approved that standard in his dissent in *Royer*; and Justice Rehnquist joined in the relevant portion of Justice Stewart's opinion in *Mendenhall* itself. Of the three remaining justices, Chief Justice Burger joined Justice Powell's concurring opinion in *Reid*, which — at the least — strongly hinted its ap-

proval of the *Mendenhall* test, and Justice Brennan appears to have applied the *Mendenhall* standard in his discussion of the detention issue in his concurring opinion in *Royer*. Only Justice O'Connor, who was not on the court when *Mendenhall* and *Reid* were decided, has not indicated her views on the issue."

Wilson v. Superior Court, supra, p. 790, Note 10.

Thus, the California Supreme Court correctly phrased the question as ". . . whether, at the time Wilson consented to the search of his attache case, a reasonable person in Wilson's position would have believed that he was not free to leave." *Wilson v. Superior Court, supra,* at 790.

The Court concludes:

". . . it is evident that Detective Kaiser did not detain Wilson, for federal constitutional purposes, merely by approaching him, identifying himself as a police officer; and asking if he might have a minute of his time. At that point, however, the officer did not simply ask Wilson if he would permit a search of his luggage. Instead, he advised Wilson that he was conducting a narcotics investigation and that he 'had received information that he [Wilson] would be arriving today from Florida *carrying a lot of drugs*.' (Emphasis added). Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

. . .

"Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances — and particularly in the ab-

sence of any clarifying advice from the officer explaining to Wilson that he was in fact free to drive away if he desired — no reasonable person would believe that he was free to leave. (See *United States v. Berry*, 5th Cir. 1982, 670 F.2d 583, 597; *United States v. Robinson*, 5th Cir. 1980, 625 F.2d 1211, 1216-1217)."

Wilson v. Superior Court, supra, at 790.

II.

There Is No Substantial Federal Question at Issue.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." 28 U.S.C., *Supreme Court Rule* 17.1. This case presents no legal innovation, no dispute as to applicable law, no conflict among the State Courts, and no conflict among the Federal Circuit Courts of Appeal. Petitioner does not request a new test or standard for when a "seizure" occurs, but urges a reassessment of the facts of this case as applied to the recognized standards of law. This Court has long held that:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."
> *Layne Bowler Corp. v. Western Wall Works, Inc.* (1923) 43 S.Ct. 422, 423, 261 U.S. 387, 393, 67 L.Ed. 712 (per Taft, C.J.).

III.

A Ruling in Favor of Petitioner Would Erode the Supervisory Powers of the Court and Lead to Random and Arbitrary Police Conduct.

The requirement that a police officer must have probable cause or some objective "articulable suspicion" before that officer may "detain" or "seize" an individual for ques-

tioning insures that a standard will be maintained with which to measure individual police conduct. In the absence of such a standard and judicial review, police are permitted to act in an arbitrary and random manner. The instant case presents facts which provide "no articulable suspicion." The California Supreme Court, analyzing the facts in light of this Court's opinion in *Reid v. Georgia* (1980) 448 U.S. 438 [65 L.Ed. 2d 890, 100 S.Ct. 2752] wrote:

> "We conclude as a matter of law that the police did not have an objective, articulable basis to justify a detention of Wilson."[6]
>
> *Wilson v. Superior Court, supra,* at 786.

A contrary ruling on the issue raised in the petition would permit police officers to randomly approach citizens in public places, politely ask for a "minute of time" and then fabricate accusatory information in order to psychologically hold the citizen in their presence while interrogation continues and "requests" to search purses, pockets, automobiles or brief cases are made. If no Fourth Amendment rights are implicated, no judicial review of police conduct is possible, and police will be encouraged to randomly, arbitrarily and deceptively invade the privacy of citizens. This is inimical to a society ruled by law and not by men.

CONCLUSION.

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL F. MOORE II,

Attorney at Law,

Attorney for Respondent.

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[6]The California Supreme Court points out that had the alleged information regarding Mr. Wilson arriving from Florida with "a lot of drugs" been substantiated with relevant testimony, there might have been a reasonable basis for the detention. However, ". . . the prosecution — despite fair warning — failed to present the relevant testimony." *Wilson v. Superior Court, supra,* at 791.

APPENDIX A.

2d Civil No. 64102.

In the Supreme Court of the State of California, in Bank.

Clerow Wilson, etc., Petitioner, v. The Superior Court of Los Angeles County, Respondent; PEOPLE, Real Party in Interest.

Filed: February 18, 1982.

Petition for hearing GRANTED. The matter is transferred to this court and retransferred to the Court of Appeal, Second District, Division One, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar. (See People v. Bower, 24 Cal. 3d 638, 643 and In re Tony C. 21 Cal 3d 888, 895-896,)

Chief Justice

MOSK,

Justice

NEWMAN,

Justice

KAUS,

Justice

BROUSSARD,

Justice

APPENDIX B.

L.A. No. 31668.

In the Supreme Court of the State of California, in Bank.

Clerow Wilson, Petitioner v. The Superior Court of the County of Los Angeles, Respondent; People, Real Party in Interest.

Filed: December 21, 1983.

The application for stay of issuance of the peremptory writ herein, is DENIED.

/s/ Bird
Chief Justice

APPENDIX C.

[Letterhead]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

January 10, 1984

Roderick W. Leonard, Esq.
Deputy District Attorney
849 South Broadway, 11th Floor
Los Angeles, California 90014-3570

RE: California v. Clerow Wilson
A-544

Dear Mr. Leonard:

Your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"1/10/84 — Denied
W.H.R."

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By
Katherine Downs
Assistant Clerk

gtb
cc: Paul F. Moore, II, Esq.